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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	
	)	

To: The Commission

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these reply comments in response to the Commission's *Public Notice* in the above-captioned proceeding.[1] In its comments, CompTel demonstrated that the time has come to lift the illegal restrictions on the use of EELs that the Commission imposed in the *Supplemental Order* and extended in the *Supplemental Order Clarification.* The basic arguments about the illegality of the use restrictions have not changed much in the 18 months since the Commission imposed them, as the comments in this proceeding illustrate. However, the facts now provide an even stronger confirmation that there is no rational public policy basis for imposing restrictions on the use of EELs.

One of the most important facts to consider is that, although the Commission intended to restrict the use of EELs only in certain situations, they have largely been unavailable

[1] *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, Public Notice, DA 01-169 (rel. Jan. 24, 2001) ("*Notice*"). *See also Common Carrier Bureau Grants Motion for Limited Extension of Time for Filing Comments and Reply Comments on the Use of Unbundled Network Elements to Provide Exchange Access Service,* CC Docket No. 96-98, Public Notice, DA 01-501 (rel. Feb. 23, 2001) (extending filing dates for comments to April 5, 2001 and for reply comments to April 30, 2001).

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to competing carriers for ***any*** services.[2] This demonstrates the fundamental flaw with use restrictions and the wisdom of Congress's decision to ban all use restrictions: use restrictions are not practical from an administrative standpoint. There are no "adjustments" that the Commission could adopt to cure this fundamental flaw with illegal use restrictions, even if some carriers are willing to "cut deals" in hopes of gaining access to EELs that they desperately need and are entitled to receive under the Act.

The comments of all parties, including the ILECs, demonstrate that use restrictions are not necessary to protect universal service: they serve only to guarantee the ILECs a certain revenue stream from tariffed special access services. Protecting ILEC revenues is not a permissible policy objective for the Commission. Further, the use restrictions are fundamentally inconsistent with the Commission's application of the impair standard, as well as its competitive policies. Therefore, the Commission should immediately lift the illegal use restrictions it imposed on an "interim" basis in the *Supplemental Order* and extended indefinitely in the *Supplemental Order Clarification*.

Recognizing the lack of any legal or equitable basis for protecting their monopoly revenue streams, the ILECs have raised the same specious arguments for restricting access to EELs that CompTel and other parties have refuted in past comments. Therefore, these reply comments focus only on a few points that may require clarification on the record.

I. USE RESTRICTIONS ARE UNNECESSARY AND INCONSISTENT WITH THE PUBLIC INTEREST

As the comments of CompTel, AT&T, El Paso, Focal, Global Crossing, Sprint, WorldCom and others demonstrate, there is no rational public policy basis for imposing

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[2] *See, e.g.*, Comments of AT&T at 3-4, 18-19; Joint Comments of Cbeyond, e.spire, KMC, Net2000, Winstar and XO at 3-6; Comments of Focal at 3-7.

restrictions on the use of EELs: The only effect of the use restrictions is to guarantee the ILECs a certain revenue stream from their tariffed special access services. Nevertheless, the ILECs continue to argue that mandating access to EELs "would be inconsistent with Congress's fundamental pro-competitive and deregulatory imperatives."[3]

For example, like a wolf in sheep's clothing, the ILECs claim that the FCC should not require them to make EELs available because it would undermine FCC policies designed to foster facilities-based competition and "slam the door" on investment capital for CLECs, which in turn would cause innovation virtually to cease.[4] Of course, the Commission should always be skeptical (as CompTel is) when the ILECs argue that a particular policy should be adopted in order to help CLECs. The ILECs never have had the interests of CLECs uppermost in mind, and it is unlikely that they have had a recent change of heart. In any event, this tired argument can be rebutted briefly. Obtaining EELs at cost-based rates does not deter efficient entry and investment by any carriers, nor does it artificially undercut any carrier's market position. As the Commission has repeatedly recognized, setting unbundled network element prices based on TELRIC encourages efficient levels of investment and entry by both competitive carriers and incumbent LECs.[5] Thus, obtaining EELs at cost-based rates will not undercut the market position of any efficient competitors, and there is no legitimate policy basis for protecting the entrenched market position of inefficient carriers.[6] Furthermore, unrestricted access to EELs will

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3 Comments of SBC and Verizon at 7-10.

4 *See, e.g., id.* at 8.

5 *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, ¶¶ 49-50 (1999), *citing Local Competition First Report and Order*, 11 FCC Rcd 15499, 15813, ¶ 620.

6 Qwest argues that the illegal use restrictions should be continued because the TELRIC standard is flawed. *See* Qwest Comments at 18. However, even if the TELRIC standard were flawed (which CompTel disputes), the Commission cannot address the flaw by (continued...)

result in more efficient use of competitive switching facilities and allow CLECs economically to expand the reach of their networks, over any range of fixed network investment. Thus, despite the BOCs' apparent concern, increasing the availability of unrestricted EELs is unlikely to depress further investment in competitive network facilities.

Protecting the ILECs' excessive special access rates also will destabilize emerging competition in the special access market segment because the ILECs can profitably price discriminate in the provision of their special access services subject to pricing flexibility where they face competition using revenue from high special access rates where they face no competition. By contrast, expanding the availability of EELs will allow more consumers to realize the benefits of price competition made possible by the Commission's pricing flexibility decision. Quite simply, neither consumers nor CLECs need the type of "protection" from competition that the ILECs are advocating.

The ILECs also claim that mandating access to EELs "would make a mockery of the Act's prime directive – to 'provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies.'"[7] Putting aside for a moment the fallacious premise that restrictions on wholesale output will somehow stimulate retail service availability, the ILECs are conveniently forgetting that the Act requires them to offer unbundled network

(...continued)
imposing a use restriction that violates the Act. Instead, Qwest should file a petition requesting the Commission to address the TELRIC standard rather than urge the Commission to violate the Act by imposing a use restriction. For the same reasons, the Commission should reject the claims of Time Warner Telecom that the illegal use restrictions should continue due to flaws with TELRIC pricing. *See* Comments of Time Warner Telecom at 9-12.

7 *See* Comments of SBC and Verizon at 9, *quoting* H.R. Rep. No. 104-458, 104th Cong., 2d Sess., at 1.

elements that satisfy the impair standard. In the *UNE Remand Order*, the Commission applied the impair standard to the components of an EEL – essentially, local loops and transport – and expressly found that carriers are impaired by the denial of access to those UNEs.[8] Therefore, the only "mockery" of the Act's prime directive is the imposition of extraordinarily complex and administratively unworkable use restrictions. Requesting carriers have been entitled to EELs as a matter of law since 1996, and the ILECs (with the unfortunate assistance of the Commission) have successfully resisted providing them for over five years.

Some ILECs claim that EELs are antithetical to Section 706 because they would result in a revenue reduction for the ILECs, which would cause them to sharply decrease their investments "in DSL, fiber in the loop, and other improvements needed to bring the broadband future to all consumers – particularly in rural areas, where demand is less certain."[9] This is an irrational argument that the Commission should reject out of hand. Monopolists restrict output, which Congress recognized in the 1996 Act. Indeed, one of the basic motivations behind the 1996 Act was the need to create competition because decades of monopoly had not resulted in the type of infrastructure investment that America needed. Moreover, the ILECs have vigorously sought to curtail or even eliminate reciprocal compensation payments to CLECs, even though CLECs could use such revenues for broadband deployment. The ILECs cannot say with a straight face that they consistently have supported policies that would permit carriers to keep pre-existing revenue streams that they might use for broadband deployment.

In effect, the ILECs are trying to blackmail the Commission with implicit threats that they will withhold investment funds from the broadband sector, particularly in rural areas,

8 *See, e.g., UNE Remand Order* at ¶¶15, 51, 53, 62, 80, 89, 165, 321.

9 *See* Comments of SBC and Verizon at 10.

unless the Commission illegally protects their monopoly special access revenue stream. However, the Commission has recognized that the protection of ILECs' revenues is not a legitimate policy objective under the 1996 Act, and it should not accede to these blackmail efforts.[10] The Court of Appeals for the District of Columbia has agreed with the Commission on this point, emphasizing even before the 1996 Act that "the goal of the agency 'is to promote competition . . . not to protect competitors.'"[11] Further, the ILECs present no evidence that they have ever used their above-cost special access revenues to fund broadband deployment efforts, and there is no reason to believe that their future broadband investment decisions will be affected by the Commission's decision on EELs. In fact, the ILECs will only restrict investment if the FCC shields them from competition by allowing them to withhold Congressionally-mandated cost-based access to their networks.

The ILECs add insult to injury by characterizing the Commission's finding in the *UNE Remand Order* that EELs satisfy the impair standard under Section 251(d)(2) as "regulatory intervention," which should be reserved for "dysfunctional markets."[12] However, application of the impair standard as Congress requires under Section 251(d)(2) can hardly be

10 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 725 ("*Local Competition Order*"), *aff'd in part, vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("The fact that access or universal service reform have not been completed by that date would not be a sufficient justification [for extending the use restriction], *nor would any actual or asserted harm to the financial status of the incumbent LECs*.") (emphasis added).

11 *CompTel v. FCC* at 530, *quoting WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, 59 RR 2d 1418, 1434-35 (1986). For the same reason, the Commission should reject the arguments of Time Warner Telecom that the illegal use restrictions are necessary to protect some CLECs from competition. *See* Comments of Time Warner Telecom at 1-15.

12 *See* Comments of SBC and Verizon at 10. If a monopoly wholesale market, in which alternatives consist of either ILEC special access or ILEC UNE combinations, does not meet the criterion of a "dysfunctional" market, then it is hard to imagine any market that would meet this definition.

criticized as regulatory overkill. To the contrary, Congress intended UNEs to be a principle entry mechanism for local providers and imposed UNE requirements with the knowledge that ILECs would not voluntarily provide UNEs to all carriers at cost-based rates absent wholesale market competition, which experience has proven to be true.

The ILECs further claim that "the Commission must resist calls to intercede on behalf of specific competitors" where a market is working well, as they claim is the case for special access and private line services.[13] The ILECs' pricing practices refute their own claim. Were this market segment really working well, they would not be able to charge above-cost special access rates which, as noted above, they now suggest could be used to fund broadband deployment throughout the country. We agree with the ILECs that the Commission must resist calls to intercede on behalf of specific competitors. In this case, that means rescinding the illegal use restrictions which have served only to insulate the ILECs' monopoly special access revenue stream from competitive market conditions.

II. USE RESTRICTIONS VIOLATE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE 1996 ACT

CompTel demonstrated in its comments that use restrictions on UNEs are inconsistent with the plain language of the statute. Nevertheless, the ILECs continue to claim that Section 253(c) expressly permits "just, reasonable, and nondiscriminatory" conditions on access to UNEs.[14] As CompTel and others have explained in past comments, nothing in Section 253, or any other provision of the Act, suggests that the Commission has the authority to impose

13 *See id.* at 10.

14 *See* Comments of BellSouth at 31-32; Comments of Qwest at 22.

use restrictions.[15] In fact, the Commission itself has found that the plain and unambiguous language of the Act prohibits use restrictions, and no court has remotely questioned this finding.[16] Thus, the ILECs' reading of section 253(c) must be rejected.[17]

As expected, the ILECs also continue to assert the claim that the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), requires the Commission to apply the impair standard on a service-by-service basis.[18] As CompTel explained in its comments, the Court's holding in *AT&T Corp. v. Iowa Utilities Board* that the Commission did not adequately consider the "necessary and impair" provisions has no effect on the Commission's long-standing practice of applying the impair standard on a functionality-by-functionality basis.

CompTel agrees with WorldCom's position that a service-by-service approach is unworkable, and presumably not what Congress intended, because it would require the Commission to undertake an impairment analysis for ***all*** network elements for ***every*** service that a requesting carrier might seek to offer.[19] This would be such a massive undertaking that the Commission could not possibly complete it. It would also be impossible to predict, define, analyze, and police every service that a requesting carrier might seek to offer. Canons of

15 *See, e.g.*, Comments of CompTel at 17-32; Comments of AT&T at 6-13; Comments of Sprint at 1-2; Comments of WorldCom at 5-13.

16 *See, e.g.*, Comments of CompTel at 17-32 (discussing past Commission holdings and court decisions).

17 It must also be rejected because it violates the basic rule of statutory interpretation that a statute must be interpreted so that all of its provisions are consistent with one another rather than in a way that creates conflict between provisions. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 512 n.5 (1992).

18 *See, e.g.*, Comments of Qwest at 22; Comments of SBC and Verizon at 10-12.

19 *See* Comments of WorldCom at 11.

statutory interpretation require the Commission to reject interpretations of the Act that lead to such absurd results.[20]

BellSouth characterizes the Commission's statutory obligation under Section 251(d)(2) to ensure that carriers have access to network elements that meet the impair standard as an exercise of its "discretion to create an entitlement."[21] Therefore, BellSouth claims, the Commission has the "legal authority to tailor that entitlement to accomplish its goals."[22] However, unbundled network elements are a statutory mandate, and the Commission cannot remove those requirements through exercise of its forbearance powers until after the ILECs have fully implemented Section 251(c).[23]

III. THERE IS NO LEGAL BASIS FOR REVISITING THE FCC'S FINDING IN THE *UNE REMAND ORDER* THAT REQUESTING CARRIERS ARE IMPAIRED WITHOUT ACCESS TO EELs

In its comments, CompTel did not address the questions that the Commission asked in the *Notice* about whether the exchange access and local exchange markets are so interrelated from an economic and technological perspective that a finding that a network element meets the "impair" standard under section 251(d)(2) of the Act for the local exchange market would itself entitle competitors to use that network element solely or primarily in the

20 *See Burns v. United States*, 501 U.S. 129, 137 (1991).

21 *See, e.g.*, Comments of BellSouth at 35.

22 *Id.*

23 *See, e.g.*, 47 U.S.C. §160(d) ("[t]he Commission may not forbear from applying the requirements of section 251(c) … until it determines that those requirements have been fully implemented.") Moreover, insofar as rates must be compensatory, the statute *removes entitlements* by attempting to approximate competition in input markets that will be expected, for some period of time following passage of the Act, to remain dominated by monopoly suppliers.

exchange access market.[24] Because the Act requires that the Commission to apply the impair standard on a functionality-by-functionality basis, a finding that a functionality meets the "impair" standard entitles carriers to use a network element to provide any telecommunications service, including exchange access service. As explained above, this interpretation is inconsistent with the plain language of the Act. Accordingly, there is no legal basis to consider the ILECs' contention that the exchange access and local exchange markets are distinct from an economic and technological perspective.

For similar reasons, there is no basis for considering the ILECs' argument that the use of EELs by requesting carriers for the routing of interexchange traffic does not satisfy the impairment standard in Section 251(d)(2)(B).[25] In the *UNE Remand Order*, the Commission applied the impairment standard to the components of an EEL – local loops and transport – and expressly found that **all** "requesting carriers," including CLECs and IXCs, are impaired by the denial of access to those UNEs.[26] The Commission emphasized that its application of the impairment standard did not reflect any specific competitive or business strategy by the requesting carrier.[27] Therefore, carriers are impaired without access to EELs no matter what service they seek to provide. Accordingly, it is not necessary or appropriate to revisit the Commission's findings of impairment in the *UNE Remand Order*, and the Commission should

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24 *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, Public Notice, CC Docket NO. 96-98, DA 01-169 (rel. Jan. 24, 2001).

25 *See, e.g.*, Comments of BellSouth at 20-29; Joint Comments of NECA, NTCA, OPASTCO, and Western Alliance at 1-3; Comments of Qwest at 9-16; Comments of SBC and Verizon at 10-24; Comments of Time Warner Telecom at 12-14.

26 *See, e.g., UNE Remand Order* at ¶¶15, 51, 53, 62, 80, 89, 165, 321.

27 *Id.* at ¶ 65. In applying the impairment standard, the Commission confirmed that "the Act is designed to create a regulatory framework that requires incumbent LECs to make network elements subject to the unbundling obligations of section 251 available to *all* requesting carriers." *Id.* at ¶53 (emphasis in original).

rebuff the ILECs' attempt to disguise their collective failure to comply with the *UNE Remand Order*, the *Supplemental Order* and the *Supplemental Order Clarification* by arguing that EELs should never have been unbundled in the first place.

CONCLUSION

The Commission should act promptly to ensure that all requesting carriers have the unrestricted use of all UNEs and UNE combinations, including the EEL, as the comments in this proceeding demonstrate. The Commission also should take this opportunity to clarify the scope of Section 51.315(b) as specified in CompTel's initial comments in this proceeding.

Respectfully submitted,

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Dated: April 30, 2001

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